United States Court of Appeals

for the Second Circuit

APPENDIX

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WITH PROOF
OF SERVICE

77-7238

B

P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

FRANK SANTORA and JOHN S. IANNONE,

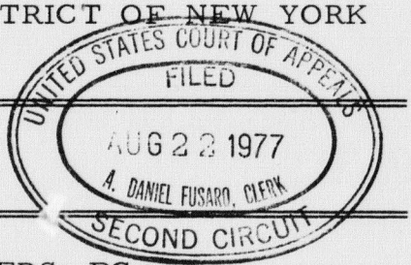
Plaintiffs-Appellants,

-against-

THE CIVIL SERVICE COMMISSION, CITY OF NEW YORK; ALPHONSE E. D'AMBROSE, PERSONNEL DIRECTOR AND CHAIRMAN, DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION; ANTHONY R. AMERUSO, COMMISSIONER OF HIGHWAYS; and HARRISON J. GOLDIN, COMPTROLLER,

Defendants-Respondents.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



APPENDIX

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DOCKET ENTRIES

DIST/OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	N/S	O	R	R 23	DEMAND $ 20	OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
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PLAINTIFFS

SANTORA, FRANK and
IANNONE, JOHN S.

DEFENDANTS WERKER, J.

THE CIVIL SERVICE COMMISSION, CITY NEW YORK:
ALPHONSE E. D'AMBROSE, PERSONNELL DIRECTOR AND CHAIRMAN,
DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION; ANTHONY R. AMBRUSO,
COMMISSIONER OF HIGHWAYS and HARRISON J. GOLDIN, COMPTROLLER,

CAUSE

Violation of Civil Rights; 28:1391 etc. ; Deprivation of Property Without due Process of Law

dd

ATTORNEYS

Marchi. Straniere & Meyers
5 Hanover Square
New York, NY 10004
742-7750

Corporation Counsel City of New York
Municipal Building, NYC 10007

CHECK HERE IF CASE WAS FILED IN FORMA	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
	APR 19 1976	68144		JS-5 XXX	
				JS-6	

76CIV1695 SANTORA FRANK -VS- THE CIVIL SERVICE COMMISSION et al WERKER, J.

DATE	NR.	PROCEEDINGS PAGE 1
04-12-76	1	Filed complaint and issed summons
04-26-76	2	Filed summons and Marshals returns - served: Harrison J. Goldin, Comptroller - 4-19-76 Alphone E. D'Ambrose, Dir. Dept. of Personnel - 4-19-76 Civil Service Comm, City of New York - 4-19-76 Anthony R. Ameruso, Comm. of Highways - 4-19-76
07-07-76	3	Filed defendants affdvt. and notice of motion to dismiss under Rule 12 ret. 7-12-76
07-07-76	4	Filed defts memorandum in support of #3.
7-[illegible]-76	5	Filed stip.and order that the ~~xxx~~ return date of defts. mtoion to dismiss complaint is ext. to Aug. 9,1976. Soordered Werker,J.(to [illegible])
10-01-76	6	Filed pltfs memorandum of law.
11-04-76	7	Filed defts reply memorandum of law.
09-17-76	-	[illegible]
4-7-77	8.	Filed Memorandum Decision & Order. Pltffs filed this action to overturn the Dep't of Personnel's decision removing them from allegedly tenured positions as District Foreman, & requiring them to resume their previous positions as Foremen Defts seek to dismiss the complt pursuant to Rule 12 on the ground that the action is barred by both the controlling statutes of limitation & the doctrine of res judicata For the reasons stated, the complt is dismissed....So Ordered,..... WERKER,J. n/m
4-12-77	9.	Filed Judgment & Order that defts have jusgment against pltffs dismissing the complt.....Clerk. n/m
5-11-77	10.	Filed Pltff's Notice of Appeal to the USCA for the 2nd Circuit from an order dismissing their complaint entered in this action on 4-7-77. m/copies.

A-3

SUMMONS

SUMMONS IN A CIVIL ACTION

CIV. 1 (2-64)
(Formerly D. C. Form No. 45 Rev (6-49))

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. _____

FRANK SANTORA and JOHN S. IANNONE,

Plaintiffs

v.

THE CIVIL SERVICE COMMISSION, CITY OF NEW YORK, ALPHONSE E. D'AMBROSE, PERSONNEL DIRECTOR AND CHAIRMAN, DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION, ANTHONY R. AMERUSO, COMMISSIONER OF HIGHWAYS and HARRISON J. GOLDIN, COMPTROLLER,

Defendants

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon ROBERT A. STRANIERE

plaintiff's attorney , whose address is MARCHI, STRANIERE & MEYERS, P.C., 5 Hanover Square, New York, New York 10004

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

_____
Clerk of Court.

_____
Deputy Clerk.

Date:

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

FRANK SANTORA and JOHN S. IANNONE,

Plaintiffs,

-against-

THE CIVIL SERVICE COMMISSION, CITY OF NEW YORK; ALPHONSE E. D'AMBROSE, PERSONNEL DIRECTOR AND CHAIRMAN, DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION; ANTHONY R. AMERUSO, COMMISSIONER OF HIGHWAYS and HARRISON J. GOLDIN, COMPTROLLER,

Defendants.
----------x

PRELIMINARY STATEMENT

(1) This is a civil action to review, vacate and annul a determination made by the Department of Personnel which on Dec. 9, 1972, terminated the plaintiffs employment as District Foremen (Highway Maintenance) without charges and without a hearing and demoted plaintiffs to the position of Foremen of Asphalt Workers from which they had been promoted some fourteen months previous. In addition, this action seeks a declaratory judgment and writ of mandamus directing the defendants to reinstate plaintiffs to their position of District Foremen (Highway Maintenance) retroactive to December 9, 1972 with back pay. Plaintiffs claim that the actions of defendants in dismissing and demoting them without charges and without a hearing violated their rights under the equal protection and due process clauses of the Fifth and Fourteenth Amendments and was contrary to the law enunciated in

Board of Regents v. Roth, 408 U.S. 546, and Perry v. Sinderman, 408 U.S. 593.

BASIS FOR ACTION

(2) The Constitution of the United States specifically provides that no person shall be denied the equal protection of the laws. It also provides that no person shall be subjected to any discrimination in his civil rights nor shall he be deprived of his property without due process of law.

JURISDICTION

(3) Jurisdiction is conferred upon this Court as follows:

(a) Section 1391, Title 28, U.S.C.

(b) Section 1331, Title 28, U.S.C. in that the damages to plaintiffs exceed $10,000 each and the matter arises under the United States Constitution and Laws;

(c) Declaratory and injunctive relief authorized by Title 28, U.S.C. sections 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, and 42 U.S.C. section 1983 which authorizes a civil action to redress the deprivation under color of law of rights, privileges and immunities secured to all persons within any State of the United States by the Constitution and Laws of the United States;

(d) The Fourteenth and Fifth Amendments to the Constitution of the United States.

(e) Subsections (3) and (4) of Section 1343, Title 28, U.S.C. in that the plaintiffs seek relief under Sections 1981 and 1983, Title 42, U.S.C., alleging a deprivation under color of state laws of rights, privileges and immunities secured by the Constitution of the United States or by Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States;

STATEMENT OF CLAIM

(4) Plaintiff Frank Santora is a long time employee of the City of New York in the Highway Department and received his first promotion on March 16, 1949 when he was promoted to the position of FOREMAN of HIGHWAY MAINTENANCE. Thereafter on December 27, 1950, he was promoted to the position of ASPHALT WORKER, HIGHWAY DEPARTMENT and on December 22, 1962 was further promoted to the position of FOREMAN, ASPHALT WORKER, HIGHWAY DEPARTMENT.

(5) Plaintiff John S. Iannone is a long time employee of the City of New York in the Highway Department who in 1969 was occupying the position of Foreman, Asphalt Worker, Highway Department.

(6) On or about February 4, 1969, the defendant Civil Service Commission announced a promotional examination for the position of

District Foreman (Highway Maintenance) in the Municipal Civil Service of the City of New York, the first such examination scheduled in over nine years.

(7) The plaintiffs received a notice of admission from the defendant Civil Service Commission and were allowed to take the examination on May 15, 1969. However, on May 5, 1970, the plaintiffs were notified that their examinations had not been rated because they were not in an eligible title that qualified them to take the examination for District Foreman (Highway Maintenance).

(8) Thereafter, the respondent Civil Service Commission and Director of Personnel were ordered by a Justice of the Supreme Court of New York County to grade the examinations of the plaintiffs and others similarly situated and to add the names of those who passed the examination to the list of persons eligible for appointment to the position of District Foreman (Highway Maintenance).

(9) In June 1971, the plaintiffs were notified that they had passed the examination for District Foreman (Highway Maintenance) and were eligible for promotion to that position which paid $2,500 per year more than the position of Foreman, Asphalt Workers, which they occupied at the time they took the examination in 1969. On September 18, 1971, the plaintiffs were promoted to the position of District Foreman (Highway Maintenance) from the eligible list.

(10) Plaintiffs' probationary period in the position of District Foreman (Highway Maintenance) expired on March 17, 1972 at which time the plaintiffs acquired tenure and could not be removed without charges and a hearing.

(11) On November 13, 1972, the plaintiffs received notice that the Civil Service Commission had determined that the position of Foreman, Asphalt Workers was not an eligible position from which one could be promoted to the position of District Foreman (Highway Maintenance) and that their employment in that position would be terminated.

(12) On December 6, 1972, fourteen months and nine days after their appointment, the plaintiffs were notified that the Department of Personnel had revoked their promotion and that they had been summarily demoted and reassigned to their former position of Foreman of Asphalt Workers.

(13) Plaintiffs thereafter learned that their promotion to the position of District Foreman (Highway Maintenance) had been disputed by a union representing the District Foremen (Highway Maintenance) and persons occupying eligible titles other than Foreman, Asphalt Workers for promotion to the position of District Foreman (Highway Maintenance). Plaintiffs were never notified of such a dispute and were not allowed to intervene or argue on their own behalf before the defendant Civil Service Commission or the Director of Personnel.

(14) The defendants with full knowledge of the plaintiffs' eligibility, knowingly permitted them to file and compete in the aforesaid examination and with full knowledge of their eligibility, certified and appointed plaintiffs from an eligible list to the position of District Foreman (Highway Maintenance) and upon the expiration of their six month probationary period, the plaintiffs were evaluated, declared to be performing satisfactorily and were permanently

retained in the position of District Foreman (highway maintenance), thereby acquiring tenure.

(15) While employed in the position of District Foreman, (highway maintenance), the plaintiff John S. Iannone became eligible to take the competitive examination for promotion to the next higher position of Borough Foreman, which test he took and passed.

(16) The decision to deny the plaintiffs eligibility to take the examination for the position of District Foreman (highway maintenance) and later to terminate the plaintiffs employment in that position was the result of an agreement between the Department of Personnel and the Commissioner of Highways on the one side and District Council 37 of the Building Service Employees on the other to restrict eligibility for promotion to persons in job classifications represented by District Council 37, which agreement ultimately led to the abrupt and illegal termination of the employment of plaintiffs in their capacity as District Foreman (highway maintenance).

(17) The plaintiffs have been denied any administrative remedy and the opportunity for any administrative appeal.

FIRST CAUSE OF ACTION

(18) Plaintiffs were appointed from an eligible list to the position of District Foreman) (highway maintenance) on September 18, 1971. The position of District Foreman (highway maintenance) is a competitive postion in the classified Civil Service. Plaintiffs were required to serve a probationary period of six months, which expired on March 17, 1972. When they were evaluated and retained beyond March 17, 1972, the plaintiffs acquired tenure and could not be removed without charges and without a hearing.

(19) On December 6, 1972, plaintiffs without charges and without a hearing were terminated in their position as District Foremen (highway maintenance) and were demoted back to their former positions of Foremen, Asphalt Workers, Highway Department. Such termination and demotion was illegal and a denial of plaintiffs constitutional rights to due process and equal protection of the laws in that they were deprived of a property right without a meaningful hearing.

SECOND CAUSE OF ACTION

(20) The action of the defendants in limiting the eligibility to take the competitive examination for promotion to the position of District Foreman (highway maintenance) to persons in job classifications represented by District Council 37 and to deny the plaintiffs eligibility to take such competitive examination and later to terminate the plaintiffs employment in that position because of their alleged ineligibility was arbitrary, capricious, unreasonable and discriminated against the plaintiffs because of their lack of membership in District Council 37. Such discrimination deprived plaintiffs of procedural due process and equal protection of the laws.

THIRD CAUSE OF ACTION

(21) A declaratory judgment is authorized by section 2201 and 2202, Title 28, U.S.C. and Rule 57 of the Federal Rules of Civil Procedure.

FOURTH CAUSE OF ACTION

(22) Preliminary and permanent injunctions are authorized restraining the defendants, their successors in office, agents and employees from interfering with or preventing plaintiffs from performing

their duties as District Foremen (highway maintenance).

(23) No previous application for the relief sought has been made to this or any other Court.

WHEREFORE, plaintiffs respectfully pray that this Court:

(a) Enter a declaratory judgment against all the defendants declaring that the action of the defendants in dismissing plaintiffs from their position of District Foreman, Highway Maintenance, to be in violation of the Constitution of the United States in that it denies plaintiffs procedural due process and the equal protection of the laws;

(b) Vacate, annul and set aside the determination made by defendants which demoted plaintiffs from their position of District Foremen (highway maintenance) without charges and without a hearing upon the alleged ground of being ineligible;

(c) Issue a writ of mandamus directing defendants to reinstate plaintiffs to their former position of District Foremen (highway maintenance) retroactive to December 6, 1972 with back pay and reinstating the plaintiff John S. Iannone to his original position of eligibility for promotion to the position of Borough Foreman;

(d) Set the case down for trial should the Court in its discretion determine that further oral testimony is necessary;

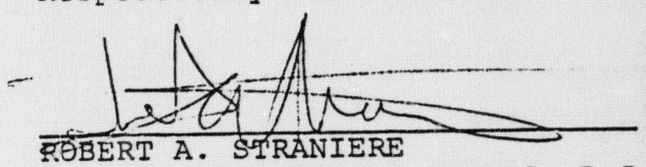
(e) Award damages in the sum of $20,000 against those defendants who conspired and deprived plaintiffs of their constitutional and civil rights;

(f) That this Court retain jurisdiction of this action until such time as defendants comply with the provisions of the Fourteenth and Fifth Amendments and the statutes enumerated above, and ;

(g) That this Court grant such other and further relief as may be just and proper.

Dated: New York, New York
March 31, 1976

Respectfully submitted,



ROBERT A. STRANIERE
MARCHI, STRANIERE & MEYERS, P.C.
Attorneys for Plaintiffs
Office and Post Office Address
5 Hanover Square
New York, New York 10004
742-7750

NOTICE OF CROSS-MOTION TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK SANTORA and JOHN S. IANNONE, Plaintiffs, v. THE CIVIL SERVICE COMMISSION, CITY OF NEW YORK, ALPHONSE E. D'AMBROSE, PERSONNEL DIRECTOR AND CHAIRMAN, DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION, ANTHONY R. AMERUSO, COMMISSIONER OF HIGHWAYS and HARRISON J. GOLDIN, COMPTROLLER, Defendants.	NOTICE OF CROSS-MOTION 76 CIV. 1965 (Judge Werker)

PLEASE TAKE NOTICE, that upon the annexed affidavit of H. KENNETH WOLFE, sworn to the 10th day of June, 1976 and upon the summons and complaint, the undersigned will move this Court at the United States Courthouse located at Foley Square, New York, New York, in Room 607(E) on the 12th day of July, 1976 at 9:30 o'clock in the forenoon of that day for an Order pursuant to Rule 12 of the Rules of Civil Procedure dismissing the complaint on the ground that the action is barred by the Statute of Limitations and the doctrine of res judicata.

PLEASE TAKE FURTHER NOTICE, that the answering papers shall be filed and served ten days prior to the return date with the original filed with the Court and a duplicate filed with Judge Werker's Chambers.

Respectfully,

W. BERNARD RICHLAND
Corporation Counsel

By: H. Kenneth Wolfe
H. KENNETH WOLFE
Attorney for Defendants
Municipal Building
New York, N.Y. 10007

AFFIDAVIT OF H. KENNETH WOLFE, ESQ., FOR DEFENDANTS. IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK SANTORA and JOHN S. IANNONE,

Plaintiffs,

v.

THE CIVIL SERVICE COMMISSION, CITY OF NEW YORK, ALPHONSE E. D'AMBROSE, PERSONNEL DIRECTOR AND CHAIRMAN, DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION, ANTHONY R. AMERUSO, COMMISSIONER OF HIGHWAYS and HARRISON J. GOLDIN, COMPTROLLER,

Defendants.

AFFIDAVIT

76 CIV. 1695

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

H. KENNETH WOLFE, being duly sworn, deposes and says:

1. I am an attorney in the office of W. BERNARD RICHLAND, Corporation Counsel, attorney for defendants herein and make this affidavit in support of defendants' motion to dismiss.

2. Plaintiffs seek to review a determination made by defendant Department of Personnel on December 9, 1972 or December 6, 1972. See paragraphs 1 and 12 of the complaint.

3. This action was commenced on April 19, 1976 and was brought pursuant to 42 U.S.C. §1983.

4. As a matter of law, the applicable Statute of Limitations for a complaint brought pursuant to §1983 is now three years. See memorandum of law.

5. Accordingly, since this action was not com-

menced within three years, it is barred by the Statute of Limitations.

6. Furthermore, a class action was brought in the Courts of the State of New York on behalf of the plaintiffs herein entitled Maurizio v. Bronstein. That suit's dismissal was affirmed by the Appellate Division, First Department, 43 AD2d 825 (1974). Accordingly, since plaintiffs were a member of the class represented by petitioner in that proceeding which was dismissed, the complaint is barred by the doctrine of res judicata.

H. Kenneth Wolfe

H. KENNETH WOLFE

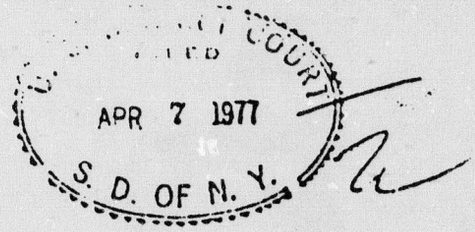
Sworn to before me this
10th day of June, 1976

Judith Kaver Kay

JUDITH KAVER KAY
Notary Public, State of New York
No. 31-4607379
Qualified in New York County
Commission Expires March 30, 1977

MEMORANDUM DECISION AND ORDER APPEALED FROM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



FRANK SANTORA and JOHN S. IANNONE,

Plaintiffs,

- against -

THE CIVIL SERVICE COMMISSION, CITY OF NEW YORK; ALPHONSE E. D'AMBROSE, PERSONNEL DIRECTOR AND CHAIRMAN, DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION; ANTHONY R. AMERUSO, COMMISSIONER OF HIGHWAYS; AND HARRISON J. GOLDIN, COMPTROLLER,

Defendants.

MEMORANDUM DECISION

76 Civ. 1695 (HFW)

APPEARANCES: (See last page)

HENRY F. WERKER, D. J.

On April 12, 1976, plaintiffs filed this action to overturn the Department of Personnel's December, 1972 decision[1] removing them from allegedly tenured positions as District Foremen (Highway Maintenance) and requiring them to resume their previous positions as Foremen of Asphalt Workers. Defendants now seek to dismiss the complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure on the ground that the action is barred by both the controlling statutes of limitation and the doctrine of res judicata. Although the defense of res judicata seems meritless,[2] for reasons noted below, the court will dismiss the complaint.

The complaint alleges that defendants violated plaintiffs' rights under the due process and equal protection clauses of the fifth and fourteenth amendments by failing to afford them any hearing prior to demotion and by restricting eligibility for promotion to union employees. Plaintiffs seek to "review,

vacate and annul" the Department of Personnel's action and in addition to $20,000 in damages further request "a declaratory judgment and writ of mandamus" directing their reinstatement as District Foremen. Jurisdiction for the court to hear claims pursuant to 42 U.S.C. § 1983 (1970) is alleged under 28 U.S.C. §§ 1343(3) and 1343(4) (1970); and for the court to hear constitutional claims, under 28 U.S.C. § 1331(a) (1970).

DISCUSSION

The proper period of limitations to be applied to actions brought under either section 1983 or the fourteenth amendment must be determined by reference to the alternatives available to litigants bringing comparable suits in the courts of this state, with the controlling period ordinarily the one thought to be "most appropriate" under state law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975); Fine v. City of New York, 529 F.2d 70, 76-77 (2d Cir. 1975).

In this jurisdiction, it has been established beyond peradventure that the state statute of limitations applicable to section 1983 actions is the three-year period for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute" found in section 214(2) of the New York Civil Practice Law and Rules (CPLR) (McKinney 1972). E.g., Meyer v. Frank, Civil No. 76-7172 (2d Cir. Jan. 12, 1977); Kaiser v. Kahn, 510 F.2d 282, 284 (2d Cir. 1974); Rosenberg v. Martin, 478 F.2d 520, 526 (2d Cir.), cert. denied, 414 U.S. 872 (1973); Romer v. Leary, 425 F.2d 186, 187 (2d Cir. 1970); see Swan v. Board of Education, 319 F.2d 56, 60 (2d Cir. 1963). Accordingly, since this action was instituted more than three years after the demotion took place, plaintiffs' section 1983 claim is time-barred and must be dismissed.[3]

Plaintiffs also seek to imply a cause of action against the City of New York directly from the fourteenth amendment, however, with jurisdiction

predicated upon 28 U.S.C. § 1331(a). Were this possible, the controlling statute of limitations would undoubtedly be the six-year period contained in the so-called "omnibus" clause[4] of CPLR § 213(1)(McKinney 1972), and the instant action would be seasonable. But it is this court's considered opinion that no such cause of action may be stated.

The Supreme Court did hold in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), that actions for damages against federal officers may be predicated directly on the fourth amendment without reliance upon a statutory springboard, but it is questionable, at best, whether the rationale of that case extends to the due process and equal protection clauses of the fourteenth amendment, which form the basis of the instant action, or to suits against nonfederal officers or agencies. See generally Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532 (1972).

Although the issue has been addressed in this circuit by both the Court of Appeals and several district courts, it remains unresolved. In Brault v. Town of Milton, 527 F.2d 730 (2d Cir. 1975), Judge Smith confidently declared for a divided Second Circuit panel that "the Braults' invocation of the Fourteenth Amendment's Due Process Clause as the source of their claim for relief comes within Bivens' sweeping approbation of constitutionally-based causes of action." Id. at 734 (Timbers, J., dissenting). However, the force of that statement is much attenuated by the Second Circuit's subsequent decision, on rehearing en banc, to dismiss the complaint on unrelated grounds for failure to state a cause of action.[5]

Since Brault, in Fine v. City of New York, supra, the Second Circuit again was presented with the question of whether substantive liability could be imposed directly under the fourteenth amendment. However, the Fine court never reached that question; rather, it remanded the action to the district court for a

determination as to whether the fourteenth amendment claim would be time-barred under the most appropriate limitations period, even if it stated an otherwise sufficient cause of action.[6] In doing so, the Court of Appeals noted that it "should not reach out to decide constitutional questions unnecessarily. 529 F.2d at 76.

Thus, confronted with two appellate decisions indicative of the Second Circuit's reluctance to declare the limits of Bivens, the district courts of this circuit have attempted to resolve the question left unanswered by Brault. In Mitchell v. Libby, 409 F. Supp. 1098, 1099 (D. Vt. 1976), Chief Judge Holden concluded, based on the en banc decision in Brault, that decisions rejecting suits under the fourteenth amendment "may be regarded as accurate reflections of the present state of the law in the Second Circuit." Similarly, although not required to resolve the issue, Judge Platt indicated in Turano v. Board of Education, 411 F. Supp. 205, 212 (E.D.N.Y. 1976), that he had "substantial doubts" as to whether the plaintiff there could maintain an action for money damages under the fourteenth amendment.

Conversely, in Savage v. Kibbee, _____ F. Supp. _____ (S.D.N.Y. 1976), this court read the Brault decision en banc more narrowly, commenting that "even if the defendants are not persons within the meaning of section 1983, jurisdiction to hear this cause of action may be found under 28 U.S.C. § 1331(a)." _____ F. Supp. at _____ (dictum). Most assuredly, this is not an isolated view. See Sanabria v. Village of Monticello, _____ F. Supp. _____ (S.D.N.Y. 1976) (Cannella, J.); Second Circuit Review, 1974-75 Term — Federal Jurisdiction, 42 Brooklyn L. Rev. 1097, 1117-18 n. 87 (1976). But see Perzanowski v. Salvio, 369 F. Supp. 223, 229 (D. Conn. 1974) (Clarie, J.). I am persuaded, however, that the Second Circuit will hold Bivens inapplicable to claims asserted against officers and agencies of municipalities under the fourteenth amendment once it is squarely presented with

the issue. Consequently, I conclude that plaintiffs' fourteenth amendment claim must be dismissed for failure to state a cause of action.

At the outset, I note that plaintiffs' constitutional claim, on its face, is neither frivolous nor interposed for the sole purpose of obtaining federal jurisdiction, and that defendants have not challenged the allegation that $10,000 is in controversy.[7] The court is therefore empowered, under the general federal question jurisdictional grant of section 1331(a), to proceed to a consideration of the merits of the complaint, Bell v. Hood, 327 U.S. 678, 682-83 (1946), and specifically, to a determination of whether it states an adequate cause of action. See Snead v. Department of Social Services, 409 F. Supp. 995 (1975) (three-judge court).

The issue then is quite simple: does the Bivens holding, that damages may be recovered against federal officers in a suit predicated solely on the fourth amendment, extend to a suit against municipal agencies and officers seeking relief directly under the fourteenth amendment? In answering this question, the exact language of the Bivens opinion is instructive. Although the Court stated that

> "... where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. "Bell v. Hood, 327 U.S., at 684 (footnote omitted),"

it was also careful to note that "the present case involves no special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396 (emphasis added). Unlike Bivens, however, the case at bar does involve "special factors" which militate against a further expansion of direct liability under the Constitution.

First, plaintiffs here present a claim under the fourteenth (not the fourth) amendment. Yet the very structure of the fourteenth amendment suggests that claims under it are to be distinguished from claims arising under other

amendments, since section 5 specifically grants the power of enforcement to Congress [8] rather than leaving the question unaddressed in the manner of other amendments to the Constitution. This distinction was noted when the fourteenth amendment was introduced in the Senate on May 23, 1866. Senator Howard of Michigan, one of the amendment's proponents, observed that

> [Section 5] casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no state infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. Cong. Globe, 39th Cong. 1st Sess. 2768 (emphasis added).

Similarly, in Ex Parte Virginia, 100 U.S. 313, decided in 1880, not long after ratification of the fourteenth amendment, Justice Strong noted that:

> All of the Amendments derive much of their force from [the 5th section of the Amendment]. It is not said the judicial power of the General Government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Id. at 346.

Justice Strong also observed that under section 5 of the fourteenth amendment, "Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the Amendments fully effective." Id. (Emphasis added.)

Thus, the proponents of the fourteenth amendment not only planned to undertake, but also expressly provided for affirmative action by Congress as a first step to judicial enforcement of the rights secured by its adoption.

Furthermore, since passage of section 1983's predecessor, the Act of April 20, 1871, was intended to prevent maintenance of suits against municipalities

in federal court, City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973); Monroe v. Pape, 365 U.S. 167, 191 (1961), Congress surely has taken affirmative action which should now counsel hesitation by the court. Although it could be argued that the adoption of general federal question jurisdiction by the Act of March 3, 1875 (now codified in section 1331(a)) reflected a change in Congressional thinking, the court is of the view that such an interpretation would do violence to the actual intent of Congress, since the legislative history of the 1975 Act is noticeably devoid of any discussion of its effect on suits against municipalities. See Snead v. Department of Social Services, supra, 409 F. Supp. at 1001 (Mulligan, J., concurring); Perzanowski v. Salvio, supra, 369 F. Supp. at 230. But see Brault v. Town of Milton, supra, 527 F.2d at 735 (opinion of the panel); cf. Lynch v. Household Finance Corp., 405 U.S. 538, 546-48 (1972) (no indication that Congress intended to narrow the Act of 1871).

Judge Smith's opinion for the panel in Brault seeks to minimize the degree of conflict between the application of sections 1331(a) and 1983 by noting that municipal immunity from damage suits will remain inviolate as to actions involving less than the $10,000 jurisdictional amount necessary under section 1331(a). Brault v. Town of Milton, supra, 527 F.2d at 735. But it fails to explain why Congress would have wanted to carve out this peculiar jurisdictional island and is, for that reason unpersuasive. Similarly unexplained is why an essentially jurisdictional enactment should be taken as an expansion of carefully delimited statutory rights.

There is yet another "special factor," worthy of notice here which distinguishes the case at bar from Bivens. Although plaintiffs have acted with necessary caution in joining several natural defendants in order to overcome the limitations of section 1983's much-discussed requirement that civil rights suits be brought against a "person," e.g., Monroe v. Pape, supra, 365 U.S. at 187-91, the

instant action is, in essence, one which is brought against a municipality. Consequently, it also brings into play considerations of federalism which were absent in Bivens, where there was clearly "very little to be gained" by proceeding with restraint. 403 U.S. at 409 (Harlan, J., concurring).

And, finally, although it is certainly not dispositive, I do not think it inappropriate to note the likely effect that "discovering" a federal cause of action springing directly from the fourteenth amendment would have upon already burdensome federal trial-court dockets. As Brault, Fine, Mitchell, Sanabria and Turano demonstrate, many state law contract and tort claims may be rephrased in terms of the fourteenth amendment. Madison v. Wood, 410 F.2d 564, 566 n.3 (6th Cir. 1969). Accordingly, in situations where New York's omnibus period of limitations controls, as I believe would be the case here, plaintiffs would be able to pursue constitutionally-based causes of action under section 1331(a) well after their time to act had expired as to both state court actions and suits under section 1983. Dilatory conduct would thus be rewarded — inasmuch as direct actions under the fourteenth amendment would not be limited to defendants considered to be persons within the meaning of section 1983 — and the fourteenth amendment would become a bottomless font of tort law. Most assuredly, the court would be rather reluctant to reach this result. Cf. Paul v. Davis, 424 U.S. 693, 701 (1976); Griffin v. Breckinridge, 403 U.S. 88, 101-02 (1971).

The complaint is therefore dismissed.

SO ORDERED.

DATED: New York, New York

April 4, 1977

Henry F. Werker

U. S. D. J.

NOTES

1. The complaint recites both December 6 and December 9, 1972 as the date on which the Department made its determination. The latter date, however, appears to be the correct one.

2. Defendants contend that plaintiffs were members of the class in Maurizio v. Bronstein, 43 App. Div. 2d 825, 352 N.Y.S.2d 424 (1st Dep't 1974) (affirmance without opinion), however, they fail to aver that the claims raised here were determined on the merits in that action. For this reason alone, reliance on the doctrine of res judicata is misplaced. Moreover, although the record before the court is woefully inadequate, it also seems that Maurizio was never certified as a class action. Plaintiffs were therefore neither parties to that action nor privies of parties therein, and defendants have not met their burden of showing the meaning of the state trial court's judgment. McNellis v. First Federal Savings and Loan Association, 364 F.2d 251, 257 n.8 (2d Cir.), cert. denied, 385 U.S. 970 (1966).

3. It seems that almost every section 1983 action brought in this jurisdiction against a municipality generates some discussion of the controlling state statute of limitations. Defendants generally, argue that the four-month period under CPLR § 217, governing challenges to administrative determinations, should be invoked as the most analogous state statute of limitations, while plaintiffs call upon the courts to reaffirm the Romer court's conclusion that the applicability of the three-year period under CPLR § 214(2) is "settled." Romer v. Leary, supra, 425 F.2d at 187. Plaintiffs here present an interesting argument, apparently of first impression, in support of an even longer period of limitations, but nevertheless an unavailing one.

   Plaintiffs note that, in determining whether or not to apply CPLR § 214(2), New York courts distinguish between suits based upon statutes imposing new substantive liabilities (to which § 214(2) would apply) and those in which the relevant statute merely limits or otherwise channels a cause of action which would exist even in the absence of a statutory enactment (where another limitations period would control). See City of Buffalo v. Maggio, 21 N.Y.2d 1017, 238 N.E. 2d 494, 291 N.Y.S.2d 1 (1968); Clark v. Water Commissioners, 148 N.Y. 1, 42 N.E. 414 (1895). Thus, application of CPLR § 214(2) would appear to be in error here if conduct violative of the fourteenth amendment may be addressed directly under § 1331(a) without any need to look to section 1983. However, in view of the court's conclusion, infra, that there is no such independent constitutional claim, CPLR § 214(2) remains as an insurmountable road block to relief under section 1983 for plaintiffs.

4. CPLR § 213 provides:

   > The following actions must be commenced within six years:
   > 1. an action for which no limitation is specifically prescribed by law.

5. As Judge Oakes observed in his dissent in Brault:

> [W]hat the majority here describes as a failure to state a claim is in reality an adjudication on the merits that the Constitution affords no remedy to persons deprived of property by the incorrect application of state judicial authority.

527 F.2d at 730.

6. Fine involved a suit for more than $5 million in damages allegedly resulting from an illegal search of an apartment. In remanding the action for further consideration, the Court of Appeals suggested that the action was controlled by "the one year and ninety day period of limitation provided by New York's General Municipal Law § 50-i, governing tort claims against municipalities." 529 F.2d at 76. Here, however, in the event they are cognizable, plaintiffs' constitutionally — based claims would seem to fall within a substantially longer period of limitations, as has already been noted.

7. Although the complaint alleges in paragraph 9 that plaintiffs' demotions have already cost them each more than $2,500 in lost wages per annum, and therefore more than $10,000 to date, a supplemental memorandum of law submitted at the request of the court appears to belie that claim. Nevertheless, even without including possible pension benefits losses in the calculus, under the more accurate figures now before the court, it is apparent that plaintiffs each will have lost more than $10,000 in salary by early 1978. Moreover, plaintiff Iannone had been promoted to District Foreman at the time his demotion took effect. If the higher salary of that position is taken into consideration, Iannone has already met the jurisdictional amount requirement of section 1331(a). Thus, it cannot be said that "it is apparent to a legal certainty, that [plaintiffs] cannot recover the amount claimed, St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938), and plaintiffs' good faith claim controls. Id. at 288.

8. Section 5 of the fourteenth amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK SANTORA and JOHN S. IANNONE,

Plaintiffs,

-against-

THE CIVIL SERVICE COMMISSION, CITY OF NEW YORK; ALPHONSE E. D'AMBROSE, PERSONNEL DIRECTOR AND CHAIRMAN, DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION; ANTHONY R. AMERUSO, COMMISSIONER OF HIGHWAYS; and HARRISON J. GOLDIN, COMPTROLLER,

Defendants.

NOTICE OF APPEAL

76 Civ. 1695 (HFW)

Notice is hereby given that Frank Santora and John S. Iannone, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order dismissing their complaint entered in this action on the 7th day of April, 1977.

Jeremiah B. McKenna
Marchi, Straniere & Meyers, PC
358 St. Marks Place
Staten Island, New York 10301
Tel. No. (212) 273-4848

To H. Kenneth Wolf
Barnard Richland Esq.
Corporation Counsel for the City of New York
Municipal Building
New York, New York 10007

filed 1/10/77

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

Murray H Berman, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 311 W 97th St New York NY.

That on the 22nd day of AUGUST, 1977, deponent personally served the within APPENDIX

upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving ONE true ~~copies~~ copy of same with a duly authorized person at their designated office.

~~By depositing true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

W. BERNARD RICHLAND
Corporation Counsel of the City of New York
Attorney for Defendants-Respondents
Municipal Building
New York, N. Y. 10007

Murray H Berman

Sworn to before me this

22nd day of August 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0330908
Qualified in Queens County
Commission Expires March 30, 1979